IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-7-2007

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

C.M.A.No.1656 of 2007 and M.P.No.2 of 2007
C.M.A.No.1657 of 2007 and M.P.No.2 of 2007

C.M.A.No.1656 of 2007

D.K.Bhaskaran ... Appellant/petitioner

Vs.

M/s.Barton Trust,
a Registered Partnership Firm,
rep.by its Partner Mr.M.A.Chacko,
Fair House, Porter Avenue,
Coonoor, The Nilgris. ... Respondent/Respondent

C.M.A.No.1057 of 2007

1. M/s.B.P.V.Classic Tea Factory Pvt.Ltd.,
rep.by its Managing Director,
Mr.D.K.Bhaskaran

2. D.K.Bhaskaran ... Appellants/Petitioners

Vs.

M/s.Forbes and Company Tea Brokers,
rep.by its Chief Executive and
Power of Attorney Agent
M.A.Chacko ... Respondent/REspondent

Both these Civil Miscellaneous Appeals are preferred against the fair and decretal order 23.1.2007 made in I.A.No.151 of 2006 in O.S.No.1 of 2005 and I.A.No.152 of 2006 in O.S.No.2 of 2005 respectively, on the file of the learned District Judge, Nilgiris, Udhagamandalam.

For Appellants : Mr.S.V.Jayaraman,
Senior Counsel
for M/s.A.Bobblie & L.Mouli
For Respondents : Mr.Srinath Sridevan

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J U D G M E N T

The above Civil Miscellaneous Appeals are filed against the fair and decretal orders dated 23.1.2007 made in I.A.Nos.151 of 2006 in O.S.No.1 of 2005 and I.A.No.152 of 2006 in O.S.No.2 of 2005 respectively, petitions filed under Order IX Rule 13 CPC to set aside the exparte decrees passed in the respective suits on 18.10.2005.

2. The respondents herein filed O.S.No.1 of 2005 and 2 of 2005 claiming a sum of Rs.5,41,030.88 and Rs.45,23,815.24 respectively with 18% interest per annum and for costs. As the defendants/appellants herein remained absent on 18.10.2005, they were set exparte and the suits were allowed as prayed for.

3. To set aside the exparte decrees, the appellants herein filed I.A.Nos.151 of 2005 and 152 of 2005 respectively under Order IX Rule 13 CPC stating that the the appellants were laid up with severe fever and diarrhoea from 16.10.2005 to 25.10.2005 and when the suits were posted for cross examination of the plaintiffs on 18.10.2005, the appellants/defendants could not attend the Court nor instruct their counsel and that the absence was not willful nor deliberate. The said applications were resisted by the respondents/plaintiffs herein contending that the applications were filed with mala fide intention to delay the execution of the decrees and the reasons stated in the affidavit are false.

4. The Trial Court, by separate orders dated 11.9.2006, directed the appellants/respondents to deposit costs of Rs.44,573.25 and Rs.3,71,175/- respectively on or before 4.10.2006 and in case of failure to comply with the said direction, ordered that the petitions shall stand dismissed. The Trial Court posted the matter on 5.10.2006 for reporting compliance of the direction. The case was posted before the Trial Court on several dates from 5.10.2006 to 23.1.2007 and on 23.1.2007 the Trial Court passed the following order:

> "For production of High Court order. High Court order copy not produced. Costs not deposited. Petition is dismissed."

It is against the said order, the defendants in the suits filed the present Civil Miscellaneous Appeals.

5. I have heard the learned Senior Counsel appearing for the appellants as well as the learned counsel appearing for the respondents in the light of the provisions contained in Order IX rule 13 CPC.

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6. The point for consideration in these appeals is whether the discretion exercised by the Trial Court while setting aside the exparte decrees ordering deposit of costs of the suits, is sustainable.

7. The reason given by the appellants for their absence on 18.10.2005 as stated in the affidavit filed in support of the petition to set aside the exparte decree is that the appellant was laid up with severe fever and diarrhoea from 16.10.2005 to 25.10.2005 and he was bed-ridden and hence he could not move out. The learned Trial Judge, after holding that the sufficient cause is shown to set aside the ex parte decrees, by order dated 11.9.2006 imposed a onerous condition to deposit the costs referred above on or before 4.10.2006.

8. It is true that the Court, which passes order in set aside petitions, is vested with the discretion to allow the petition on terms. It has to be ascertained whether in this case, the course adopted by the trial court is just and proper, in the circumstances of the case, wherein the petitioner failed to appear before the Court due to his illness.

9. Sufficient cause having been made out even as per the order of the Trial Court, onerous condition for restoration cannot be imposed while setting aside the exparte orders under Order IX Rule 13 CPC. The above issue is considered in a number of decisions.

(a) In the decision reported in AIR 1958 Madras 522 (Sri Krishna Rice Mills v. P.Rajagopala Konar) while setting aside an exparte decree, this Court awarded cost of Rs.75/- to compensate the respondent for the waste of time, money and energy caused to him and the suit was restored for fresh disposal.

(b) In 1965 (1) MLJ 209 (Dhanalakshmi Ammal v. Shanbagalakshmi Ammal and others) a condition imposed to deposit the cost to hear the application to set aside the exparte decree was found erroneous and set aside and it is held that the conditional order can be passed for restoration of the suit which must be just and reasonable.

(c) In AIR 1972 Allahabad 166 (Nanak Chand v. Goswami Preetam Lal) a learned Judge of the Allahabad High Court, following a Division Bench decision of that Court reported in AIR 1926 Allahabad 142 (Ahmad Hussain v. Har Dayal), held that an order restoring the case for default of condition of payment of a reasonable amount of the cost to the opposite party can be passed under Order IX Rule 13 CPC.

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(d) A Division Bench of the Calcutta High Court in the decision reported in AIR 1977 Calcutta 428 (Foundation Overseas Ltd. v. Punjab National Bank Ltd.) considered a direction to restore the suit, which was dismissed for default to furnish security as condition precedent, was held not valid.

(e) The Allahabad High Court in AIR 1979 Allahabad 370 (Raj Kumar v. Mohan Meakin Breweries) held that the direction to deposit 1/5th of the suit amount as condition precedent to set aside exparte decree even after giving a clear finding that there had been sufficient cause for being absent on the date when exparte decree was passed was held illegal.

(f) In AIR 1987 Calcutta 197 (LIC of India v. Anjan Kumar) the Calcutta High Court held that while setting aside the exparte decree imposing of condition must be reasonable and must have some justification having regard to the attending circumstances and the same cannot be imposed arbitrarily.

(g) A Direction to pay mesne profit as condition precedent for setting aside the exparte decree was cancelled by the Honourable Supreme Court in the decision reported in 1996 (7) Scale 410 (Kumud Lata Das v. Indu Prasad).

(h) A direction to deposit the entire decree amount as well as cost for restoration of the suit was set aside by the Honourable Supreme Court in the decision reported in (1996) 10 SCC 93 (State of Orissa v. Sibaram Baral).

(i) Sufficient cause for non-appearance to be proved on the date of hearing alone and not anterior or posterior to the said date was considered by the Honourable Supreme Court in the decision reported in (2000) 3 SCC 54 (G.P.Srivastava v. R.K.Raizade and others). In paragraph 7 of the Judgment the Supreme Court held thus,

> "7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words "was prevented by

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any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not ma la fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

(Emphasis Supplied)

(j) An unreasonable condition imposed to restore the suit which was decreed exparte was found erroneous by the Honourable Supreme Court in the decision reported in (2002) 3 SCC 159 (V.K. Industries v. M.P. Electricity Board), wherein in paragraphs 4 to 6 it is held thus,

"4. The only grievance of the appellants is that the terms, upon which ex parte decree is set aside, are onerous and not reasonable. On behalf of the respondents submission was made supporting the said terms as justified.

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5. Ordinarily, a money decree is not stayed unconditionally and the judgment-debtor would be put on terms. Even so, such conditions must be reasonable having regard to all relevant factors. Although ex parte decree was passed against the appellants, once it is set aside on the ground of non-service of suit summons the money decree did not exist for execution. It is no doubt true that in restoring a case the court may impose conditions to deposit costs or the decretal amount or some portion thereof or to ask the defendant to give security but such conditions should be reasonable and not harshly excessive. In the impugned order the appellants are put on terms to deposit a sum of Rs.2,00,000 and to furnish a bank guarantee for the remaining suit claim within a period of two months. In our view these terms are onerous, harsh and unreasonable in the facts and circumstances of the case and that too even before the trial of the suit on merits.

6. On 29-10-2001, the learned counsel for the appellants stated that within two weeks, a sum of Rs.50,000 shall be deposited in the trial court and notice was issued on that day. During the course of hearing the learned counsel informed that a sum of Rs.50,000 is already deposited in the trial court."

10. In the decision cited by the learned counsel for the respondent reported in AIR 1953 Madras 464 (Nalabala Chalamiah v. Nalabala Rubiah) this Court upheld the direction to deposit cost of the suit was not found unreasonable and the same cannot be applied to the facts of this case since cost of the suit in C.M.A.No.1656 of 2007 is Rs.3,39,287/- and in C.M.A.No.1657 of 2007, the cost imposed was Rs.44,573.25. The said amounts having been huge amounts, I am of the view that the condition imposed is onerous and the same is liable to be set aside. However, taking note of the expenses incurred by the respondent due to the absence of the appellants in these appeals, cost of Rs.2,000/- is ordered to be paid to the respondents in C.M.A.No.1656 of 2007 and Rs.3,000/- is ordered to be paid to the respondents in C.M.A.No.1657 of 2007 as compensatory costs. The said amount shall be paid by the appellants within a period of two weeks from the date of receipt of copy of this order and file a memo to that effect before the Trial Court. On such memo being filed, the Trial Court is directed to restore the suits. The suits having been filed in the year 2005 and being money suits, the Trial Court is directed to dispose of the suits within a period of two months from the date of restoration of the suits.

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The Civil Miscellaneous Appeals are allowed with the above directions. No costs.

vr

Sd/
Asst. Registrar

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Sub Asst.Registrar

To
1.The District Judge, Nilgiris, Udhagamandalam.
+ 2 ccs to Mr. A. Bobblie Advocate sR 46864
+ kone cc to Mra. Srinath Sridevan, Advocates SR 47297
ASM (co)
sg 10/08/07

Judgment in
C.M.A.No.1656 & 1657/2007
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